No. 6178

United States
Circuit Court of Appeals
For the Ninth Circuit

CITY OF RENO, a Municipal Corporation,
Appellant,

vs.

SIERRA PACIFIC POWER COMPANY, a Corporation,
Appellee.

Appellant's Brief

Upon Appeal from the United States District Court for the District of Nevada.

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INDEX OF SUBJECT MATTER

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

SIERRA PACIFIC POWER COMPANY, a Corporation, Plaintiff and Appellee, vs. CITY OF RENO, a Municipal Corporation, E. E. ROBERTS, Mayor of the City of Reno, JAMES GLYNN, City Engineer of the City of Reno, LeROY F. PIKE, City Attorney of the City of Reno, Defendant, City of Reno, Appellant.	IN EQUITY No. G-29 APPELLANT'S INITIAL BRIEF

STATEMENT OF CASE

Appellee is a corporation of the State of Maine and appellant, City of Reno, is a municipal corporation of the State of Nevada and now contains and for more than ten years last past has contained a population of more than ten thousand inhabitants.

Appellee and its predecessors in interest have for many years last past been and now are engaged in the business of serving and distributing water to appellant and its inhabitants and using under claim of franchise rights so to do the streets and alleys of appellant for the purpose of effecting such service and distribution.

Neither appellant nor any of its predecessors in

interest have as yet installed any mechanical devices or water meters in the City of Reno for measuring the quantity of water distributed to said city, or to its inhabitants, save a few the installation of which precipitated the above entitled pending suit.

At sometime shortly prior to March 27, 1930, appellee without the consent or permission of the Public Service Commission of the State of Nevada commenced the installation, upon the streets of the City of Reno, of water quantity measuring meters and upon discovery of the fact the said City acting by its mayor and city attorney demanded the removal of the installed meters immediately and threatened to have the city engineer remove them if appellant did not do so.

Upon the succeeding day, March 28, 1930, appellant renewed its demand for the removal of the meters within ten days and again notified appellee that if it did not remove the meters within the ten days the city engineering department would do so.

On April 3, 1930, appellee filed its complaint against the City of Reno and its mayor, city engineer and city attorney, praying for a temporary restraining order without notice and upon hearing its continuance as an injunction **pendente lite** until final determination of the cause restraining the City and its officers from removing or destroying the installed meters and from preventing appellee from continuing to install meters.

Upon the next day, April 4, 1930, the lower court upon the verified complaint and the motion of ap-

pellee's solicitors, and without notice to defendants or either thereof, issued its temporary restraining order in accordance with the prayer of appellee's complaint.

Thereafter on hearing day appellant moved for a dismissal of the complaint on various grounds and also moved for a dissolution of the temporary restraining order issued without notice upon the specific ground that the order was voidable and ineffectual for the reason that it did not in itself define the injury and did not state why it is irreparable, and did not state why it was issued without notice.

The court after argument on the motions took them under advisement and on May 5, 1930, rendered and filed its memorandum decision and orders denying appellant's motions to dismiss the complaint and to dissolve the temporary restraining order and further ordered the latter order continued as an injunction **pendente lite** modified however to a maintenance of the status quo of the subject matter of controversy.

Thereupon the appellant, City of Reno, appealed to this court.

Since the initiation of the appeal the defendants answered upon the merits of the action and appellee thereupon filed its reply to the answer.

SPECIFICATION OF ERRORS RELIED UPON

1. The court erred in denying appellant's motion to dismiss the complaint because it appeared to the court therefrom that appellant, City of Reno, is a city of more than ten thousand inhabitants and that the installation of water quantity measuring meters therein was and would be in violation of a statute

of the State of Nevada approved March 28, 1919.

2. The court erred in denying the motion to dismiss the complaint because it failed to allege the permission or consent of the Public Service Commission of the State of Nevada to install within the City of Reno water quantity measuring meters.

3. The court erred in denying the motion to dismiss the complaint because it failed to plead the authority granting, the duration, or the terms and conditions of any franchise under which it claims the right to install water quantity measuring meters in the City of Reno.

4. The court erred in denying the motion to dismiss the complaint because it appears therefrom that appellee was not and is not the owner of the water served and distributed to appellant, City of Reno, and to its inhabitants, but that the latter are the owners thereof and that appellee is the mere agent of the latter in serving and distributing such water.

5. The court erred in denying the motion to dismiss the complaint because it fails to plead any facts showing an actual necessity requiring the installation of water quantity measuring meters in the City of Reno.

6. The court erred in denying the motion to dismiss the complaint because it failed to plead any fact showing that the installation and maintenance of water quantity measuring meters would not constitute an obstruction to the proper and reasonable use of the streets and alleys of Reno by the general public.

7. The court erred in issuing its temporary restraining order without notice because the verified

complaint upon which alone the order was issued failed to **clearly** show appellee's danger of suffering immediate and irreparable injury, loss, or damage, unless appellant was enjoined without notice.

8. The court erred in issuing its temporary restraining order without notice and failing therein to specifically define the injury and to state why it is irreparable and why it was granted without notice.

9. The court erred in denying appellant's motion to dissolve the temporary restraining order because the same failed therein to define the injury and to state why it is irreparable and why it was granted without notice.

10. The court erred in continuing in a modified form as an injunction **pendente lite** the temporary restraining order because the same was voidable and ineffectual and should have been dissolved upon appellant's motion.

BRIEF OF ARGUMENT

I.

In support of its Specifications of Errors Relied Upon, 1, appellant cites the following provisions of a general Statute of the State of Nevada entitled, "An Act defining public utilities, providing for the regulation thereof, creating a public service commission, defining its duties and powers, and other matters relating thereto," approved March 28, 1919, and found in the Statutes of Nevada for the year 1919, commencing therein at page 198:—

"Section 1. The public service commission is hereby

created whose duty it shall be to supervise and regulate the operation and maintenance of public utilities, as hereinafter named and defined, in conformity with the provision of this act."

"Sec. 7. . . . 'Public Utility' shall also embrace every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, that now or hereafter may own, operate or control any plant or equipment, or any part of a plant or equipment within the state for the production, delivery or furnishing for or to other persons, firms, associations or corporations, private or municipal, heat, light, power in any form or by any agency, water for business, manufacturing, agricultural or household use, or sewerage service whether within the limits of municipalities, towns or villages or elsewhere; and the public service commission is hereby invested with full power of supervision, regulation and control of all such utilities, subject to the provisions of this act and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village, unless otherwise provided by law." . . .

"Sec. 13. The commission may, when necessary, ascertain and prescribe for each kind of public utility adequate, convenient and serviceable standards for the measurement of quality, pressure, voltage or other conditions pertaining to supply of the product or service rendered by any public utility,and prescribe reasonable regulations for the examining and testing of such products or service and for the measurement

thereof. Any consumer, user or party served may have the quality or quantity of the product or the character of any service rendered by any public utility tested upon the payment of fees fixed by the commission, which fees, however, shall be paid by the public utility and repaid to the complaining party if the quality or quantity of the product or the character of the service be found by the commission defective or insufficient in a degree to justify the demand for testing; or the commission may apportion the fees between the parties as justic may require; provided, that in cities of more than ten thousand population nothing contained in this act shall direct or permit the installation or the use of mechanical water meters or similar mechanical devices to measure the quantity of water served or delivered to water users.

"The commission may, in its discretion, purchase such materials, apparatus, and standard measuring instruments for such examination and tests as it may deem necessary. The commission shall have the right and power to enter upon any premises occupied by any public utility for the purpose of making the examination and tests provided for in this act and set up and use on such premises any necessary apparatus and appliances and occupy reasonable space therefor. Any public utility refusing to allow such examination to be made as herein provided shall be subject to the penalties prescribed in section 11 of this act." . . .

It at all times has been admitted by the appellee and was by it specifically admitted at the hearing in the district court, that appellant, City of Reno, is and

for more than ten years last past has been a city of more than ten thousand population. Even had such admission never been made such fact sufficiently appears by applying the principles of mean averages to the allegations of maximum and minimum water consumption found in paragraph IV of appellee's complaint.

Transcript of Record, p. 5.

While specific reference to the Nevada public statute cited above appears in paragraph V of appellee's complaint, Transcript of Record, p. 8, yet it is not essential that in either the district court or in this court the statute must be pleaded to entitle it to consideration.

In federal practice all courts take judicial notice, without pleading, of the public statutes of the State where they are exercising their functions.

Furman vs. Nicholls, 8 Wall, 44.

Schevenell vs. Blackwood, 35 Fed. (2d) 423.

It will readily be observed from the aforesaid provisions of statute that the supervision and regulation of the operation and maintenance of public utilities in Nevada is delegated exclusively to the public service commission of the State.

It also plainly appears therefrom that the commission itself can lawfully act only in conformity with the provisions of the act creating it.

It would seem to necessarily follow that the public service commission could not in conformity with the terms of the proviso in the statute cited permit the installation of water quantity measuring meters in

Reno and certainly, no other power could do so because of the commission's exclusive power of supervision and regulation.

It is appellant's view that the district court erred in adopting appellee's contention that because it intended to use the meters for other purposes than to obtain a base for rate charges against water users the statutory inhibition does not apply. The statute does not contemplate possible intended objectives other than an ultimate one of fixing unit rate charges based upon the amount of water delivered. The meters sought to be installed admittedly are water **quantity** measuring devices and not ones for ascertaining the quality, pressure, or other elements incident to the use of water.

Again it specifically appears from the allegations of appellee's complaint

"That the installation of said meters is necessary in order that plaintiff may determine and ascertain from time to time the amount of water used by various of its consumers so that the company may from time to time classify its said consumers for the purpose of fixing and determining the rate classification to be charged for the service and to the classes of consumers using the same."

Transcript of Record, p. 6.

It is fundamental in our jurisprudence that equity follows the law or is as stated by Broome as a maxim:

"Equity is the handmaiden of the law, not its mistress."

It is earnestly submitted that whether or not the

motion to dismiss should have been sustained it is clear the motion to dissolve the restraining order should have been granted because of the effect of the statute cited.

II.

Relative to assigned error 2 to the effect that the district court erred in refusing to dismiss the complaint because it failed to allege permission of the public service commission to install water quantity measuring meters in Reno appellant urges that even though the installation of water quantity measuring meters were intended to be used only as mere check meters yet they clearly fall within the inhibition of the statute.

If this conclusion must follow the issueable situation disclosed by the pleadings it must be apparent that not only the district court erred in refusing to dismiss the complaint but also erred in granting a temporary restraining order and in continuing it as an injunction **pendente lite.**

III.

Now referring to assigned error relied upon by appellant based upon its claim that appellee's complaint fails to properly plead any franchise right of appellee entitling it to install water quantity measuring meters in Reno appellant contends the record on appeal is quite clear in support of the contention.

The only allegation in the complaint upon the subject of franchise reads as follows:

"That plaintiff and its predecessors in interest, acting as aforesaid, have been acting under and by virtue

of franchise and the right to furnish, serve, distribute and sell water to the inhabitants of the Cities of Reno and Sparks and to said Cities of Reno and Sparks, for domestic use, commercial purposes, fire and other sundry purposes and uses."

Transcript of Record, p. 4.

Whether appelle by this allegation means that its alleged **right** is derivative from **franchises** or is one independent of franchises is a baffling puzzle unless we apply the rule of grammatical construction that the coordinate conjunction **and** ordinarily conjoins independent elements and therefore appellee has intended to plead not only a franchise right but also a right independent of franchise to install its water quantity measuring meters in Reno.

It is too plain to require argument that the complaint does not plead sufficient, or any, facts entitling it to install the meters independent of franchise right.

We think it almost equally plain that appellant has signally failed in both its complaint and in its proof at the hearing to connect with any franchise right or rights whatever entitling it to install the meters.

A bare allegation that in its water service operation appellee has been acting under and by virtue of franchises can not in conformity with any established rule of fact pleading be held equivalent to or as being an ownership allegation of franchise rights.

"Franchises are special privileges conferred by government upon individuals, and do not belong to citizens of the country generally, of common right. It is essential to the character of a franchise that it should

be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from the law of the state."

Bank vs. Earl, 13 Pet., 595.

People's Co. vs. Memphis Co., 10 Wall, 38.

Western Union Co. vs. Norman, 77 Fed., 13.

Those pleading alleged franchise rights must plead their derivation, scope, and tenure because their operative effect is a matter of law for the court to decide upon alleged and proven facts and because they are strictly construed against the grantee and in favor of the public and nothing will pass thereunder unless it is granted in clear and explicit terms.

Covington Co., vs. Sanford, 164 U. S. 578.

Oregon Co. vs. Oregonian Co., 130 U. S. 1.

State vs. Dayton Co., 10 Nev., 155.

Lake vs. V. & T. Co., 7 Nev., 294.

The evidence introduced by appellee at the hearing in the district court utterly failed to connect appellee with any franchise right whatever.

The evidence adduced in addition to the complaint consisted of six documents only and file marked exhibits "B.," "C.," "D.," "E.," "F.," and "G."

Transcript of Record, pp. 31-76.

The nature of the contents of these exhibits are as follows:

B. Commissioner's grant to Reno Water Co.

C. Commissioner's grant to Reno Water Co.

D. Deed, Reno Water Co. to Reno Water, Land & Light Co.

E. Deed, Reno Water, Land & Light Co. to Nevada Power, Light and Water Co.

F. Deed, Nevada Power, Light and Water Co., to Reno Power, Light and Water Co.

G. Deed, Reno Power, Light and Water Co. to Truckee River General Electric Co.

It will thus be seen that these exhibits do not even mention appellee, Sierra Pacific Power Company.

No franchise right or rights of appellee of any kind having been either pleaded or proved it would seem to be an irresistible conclusion of law that appellee is precluded from claiming any franchise right to install quantity measuring meters in Reno.

IV.

Now alluding to assigned error 4 relied upon by appellant upon the theory that the several allegations in appellee's complaint to the effect that appellee now is and has been engaged in the business of "selling water" to the cities of Reno and Sparks and to their inhabitants are contrary to the established law of the State of Nevada as adjudged by its Supreme Court we view this phase as follows:

That appellee under the laws of the State of Nevada is not and never has been the owner of the water it diverts, transports, and distributes or had title thereto and in such diversion, transporation, and distribution is and at all times has been the agent of the water users is **stare decicisis** in Nevada.

Prosole vs. Steamboat Canal Co., 37 Nev. 154.

The decision of the Nevada Supreme Court in the last cited case establishes a rule of law definition of

property rights on a local question not affected by general federal law and in such case the federal court will follow the decision of the highest State Court.

Olcott vs. Bynum, 17 Wall, 44.

Concord vs. Bank, 92 U. S. 628.

Clark vs. Clark, 178, U. S. 186.

V.

Requesting the attention of this court to assigned error 5 in which appellant insists that the complaint fails to plead any facts tending to show an actual necessity for installing the water quantity measuring meters in Reno we urge that a scrutiny of the alleged necessity facts discloses that they are mere conclusions of the appellee.

Transcript of Record, p. 6.

In each and every of these necessity allegations there is no assertion, or intimation even, that the objective ascertainment sought cannot readily be obtained otherwise than by the installation of meters.

It is a well settled rule of law in both the federal and state courts in equity actions as well as in those at law that immaterial matters, conclusions of law, and conjectural averments in a pleading may be disregarded and are not admitted even by a failure to deny them.

Central Bank vs. Conn. Ins. Co., 104 U. S. 54.

Hooper vs. Meyer, 1 Nev. 433.

Kidwell vs. Ketler, 146 Cal. 17.

Chicot Co. vs. Sherwood, 148 U. S. 529.

Equitable Soc. vs. Brown, 213 U. S. 25.

Interstate Co. vs. Maxwell Co., 139 U. S. 569.

VI.

Adverting to assigned error 6 relative to appellant's claim that the complaint fails to plead any fact showing that the meters will not constitute obstruction in the streets we cite the only allegation in that respect:

> "That the meters which have been installed by plaintiff, as well as the meters which the company proposes to install, together with the foundations therefor, do not and will not constitute obstructions in any of the streets and alleys of the City of Reno."
>
> Transcript of Record, p. 7.

If this allegation is anything more than the bold conclusion of the pleader we fail to understand plain English language.

Neither courts nor individuals can be expected to be mind readers and know whether the meters proposed to be installed will be street obstructions in the absence of any allegation whatever respecting their character and manner of installation.

VII.

Respecting assigned error 7 in which appellant claims that the complaint fails to clearly show appellee's danger of suffering immediate and irreparable damage unless appellant was enjoined without notice we submit that this error is apparent.

The meters sought to be installed and their foundations are mere merchandise commodities and if removed or even destroyed the resulting damage is one

easily ascertainable as a matter of fact. It is almost inconceivable that such damage would be remediless.

A mere allegation that threatened injury or damage is irreparable is insufficient to **clearly** show the element of irreparability. Such showing must be made to appear by verified statements of specific facts.

The amended federal judicial code contains the following mandatory provision:

> "No temporary restraining order shall be granted without notice to the oposite party unless it shall clearly appear from specific facts shown by affidavit or the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon."
>
> 38 Stat. 737, approved, Oct. 15, 1914.

VIII.

Appellant's assigned error 8 resting upon the fact that the district court granted the temporary restraining order without notice and failed therein to specifically define the injury and why it is irreparable and why it was granted without notice is indisputable if the amended federal judicial code upon this subject is effectively controlling and which reads as follows:

> "Every such temporary restraining order shall be endorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and

state why it is irreparable and why it was granted without notice."

Par. 17, 38 Stat. 737, approved, Oct. 15, 1914.

The restraining order is fatally defective in this matter of contents.

Transcript of Record, pp. 17-18.

If it be contented or suggested by appellee that the restraining order complies with the requirements of Equity Rule 73 as adopted by the Supreme Court of the United States we answer that these Equity Rules were adopted by the Supreme Court and became effective on February 1, 1913, and at the time of their adoption conformed with the requirements of the federal law as it existed at that time. As heretofore cited however on October 15, 1914, the federal judicial code was amended by adding, **ex industria,** the requirements that temporary restraining orders granted without notice to the opposite party must in themselves specifically define the injury and state why it is irreparable and why it was granted without notice.

It is not believed that appellee will for a moment contend that rules of court are not superseded by later statutes regulating the particular subject matter embraced by both.

If such contention is advanced by appellee we cite to the contrary:

Gaines vs. Relf, (U.S.) 10 L. Ed. 642.

Storey vs. Livingston, (U.S.) 10 L. Ed. 200.

Ames vs. Smith, (U.S.) 10 L. Ed. 947.

IX.

In support of assigned error 9 in which appellant asserts that the district court erred in denying its motion to dissolve the temporary restraining order because it failed to define the injury and to state why it is irreparable and why it was issued without notice we renew our views as expressed in the last foregoing paragraph of this brief.

While the mandatory requirements of the federal law of October 15, 1914, may have been overlooked by appellee's solicitors and the district court at the time of the granting of the temporary restraining order they could not have escaped notice and scrutiny when the motion to dissolve was made in reliance upon these particular requirements.

X.

We insist that assigned error 10 attacking the continuation of the temporary restraining order as an injunction **pendente lite** notwithstanding the motion to dissolve it is fundamentally sound.

If our insistence that the temporary restraining order is inherently fatally defective it is palpably frivolous to contend that an order continuing it as an injunction **pendente lite** cures its fatal defects.

XI.

In conclusion we submit that if the laws of the State of Nevada and of the United States hereinbefore cited are applicable to the situation under consideration and that their express terms have been disregarded as though they were merely directory formula this court should reverse the district court

and direct it to dissolve the temporary restraining order both as an initial writ and as an injunction **pendente lite.**

Respectfully submitted,

LeROY F. PIKE,

Attorney for Appellant.

SARDIS SUMMERFIELD,

Solicitor for Appellant.

Service of the foregoing brief by copies delivered to us is hereby admitted this.....day of August, 1930.

.....

Solicitors for Appellee.